Accordingly, the Commission should, as suggested in its *Notice of Inquiry*, rely "on free markets and private enterprise to deploy advanced services."[70] The only action the Commission need or should take is to make clear that incumbent LECs will not be relieved of their Section 251(c) network unbundling and resale obligations with respect to advanced telecommunications services until such time as Section 251(c) has been fully implemented and the Commission determines that forbearance from these requirements is required under Section 10 of the Communications Act. Definitive action by the Commission of this sort hopefully will put an end to incumbent LEC manipulation of advanced telecommunications deployment in an unfortunate effort to secure unwarranted regulatory relief.

Affording incumbent LECs relief from their statutory resale and network unbundling obligations is not only not necessary to prompt deployment of advanced telecommunications services, it would jeopardize what competitive inroads have been made to date into the local market, hinder future efforts to expand local competition, and diminish competition in the interexchange market. Competitive inroads into the local market to date have been minimal, with incumbent LECs

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[70] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, FCC 98-187, ¶ 5 (released Aug. 6, 1998).

continuing to control roughly 98 to 99 percent of the local markets they serve.[71] What success there has been has been achieved not only through resale, but through non-facilities-based resale.[72] Thus, for example, in evaluating BellSouth Corporation's ("BellSouth") most recent application for in-region, interLATA authority in the State of Louisiana, the U.S. Department of Justice ("DOJ") found

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[71] *See, e.g.*, Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (Memorandum Opinion and Order), CC Docket No. 97-211, FCC 98-225, ¶ 168 (Sept. 14, 1998) ("[E]ven in the market for business customers in the New York metropolitan area, . . . 'probably the most competitive local exchange market in the country,' the incumbent LEC has lost only six percent of the market to competitors. In many other places, the incumbent LEC's market share is or approaches 100 percent."); Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd. 539 at ¶ 22 ("We recognize that local competition has not developed in South Carolina and other states as quickly as many had hoped . . . [T]he Department of Justice estimates BellSouth's market share of local exchange in its service area in South Carolina as 99.8% based on access lines"). The U.S. Department of Justice ("DOJ") recently estimated that in the State of Louisiana, "[i]n the aggregate, wireline competitors have about 2% of the local exchange market based upon access lines, while BellSouth still has the remaining 98% in its service area." Evaluation of the United States Department of Justice filed in CC Docket No. 98-121, Appx. A, p. 4 on August 19, 1998. In Ameritech's "in-region State" of Michigan, the Justice Department calculated that "the aggregate market share of CLECs, measured by total number of access lines statewide using all forms of competition (separate facilities, unbundled loops and resale), appears to be between 1.2% and 1.5%." Evaluation of the United States Department of Justice filed in CC Docket No. 97-137, Appx. B, p. 3 on June 25, 1997.

[72] A year ago, a third of TRA's resale carrier members reported that they were providing, or attempting to provide, competitive local exchange service, while an additional third reported plans to enter the local market within twelve months. TRA's resale carrier members are currently providing, or attempting to provide, competitive local exchange service in 44 states. The largest numbers of TRA resale carrier members are operating in local markets in the States of Florida and New York, with secondary concentrations in the States of California, Georgia, Illinois, Kentucky, Massachusetts, North Carolina, Tennessee, Texas, Virginia, Washington and Wisconsin. The majority of TRA's resale carrier members are providing local exchange service exclusively through resale, although roughly a third are making some use of unbundled network elements. More than a fifth of the local service customers served by TRA's resale carrier members are residential users. Source: Telecommunications Resellers Association, "1997 Reseller Membership Survey and Statistics" at 1, 15; Telecommunications Resellers Association, "Member Survey of Local Competition," pp. 2, 4 - 5, 8 - 10 (April, 1998).

that more than 90 percent of the access lines served by competitive LECs were resold lines, and that the large majority of these lines, including the overwhelming majority of lines provided to residential users, were provided by "'pure' resellers (*i.e.*, resellers with no plans for facilities-based market entry)."[73] Hence, resale carriers, particularly smaller providers, are not only currently driving local competition, but are also the principal source of alternative local service offerings to residential users. As Chairman Kennard has emphasized, "resale is the key to bringing immediate choice to residential customers."[74]

Resale carriers have made significant competitive inroads in the interexchange market, and are now beginning to make such inroads in the local market, by identifying underserved market segments and providing such market segments with lower rates and/or better service than would otherwise be made available to them by larger facilities-based providers. As the Commission has recognized, "small businesses are able to serve narrower niche markets that may not be easily or profitably served by large corporations, especially as large telecommunications expand globally."[75] By targeting market segments which have been overlooked or ignored, resale carriers generate competitive pressure on larger providers who can no longer afford to take these underserved market segments for granted. In this manner, resale, among other things, "encourag[es] competitive pricing, . . . discourag[es] unjust, unreasonable, and unreasonably discriminatory carrier practices,

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[73] Evaluation of the United States Department of Justice filed in CC Docket No. 98-121, Appx. A, p. 4 on August 19, 1998.

[74] Remarks by William E. Kennard, Chairman, Federal Communications Commission, delivered to the Practicing Law Institute on December 11, 1997.

[75] Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), GN Docket No. 96-113, FCC 96-216, ¶ 6 (1996).

. . . promot[es] innovation and the efficient deployment and use of telecommunications facilities, . . . improv[es] carrier management and marketing, . . . generat[es] increased research and development, and . . . positively affect[s] the growth of the market for telecommunications services."[76] Or, as characterized by the Commission "in markets that have not achieved full competition," an active resale market "helps to replicate many of the features of competition . . . [and] hastens the arrival of competition by speeding the development of new competitors."[77]

Any action taken by the Commission that would deny resale carriers access to advanced telecommunications services at wholesale rates for resale would obviously diminish these pro-competitive impacts. Admittedly, resale carriers do not contribute to the deployment of the infrastructure necessary to provide advanced telecommunications services. They will, however, facilitate the broad distribution of such services and generate the price and service competition associated with such distribution. If advanced telecommunications services are among the offerings included in their product and service portfolios, resale carriers will make it impossible for incumbent LECs to offer such services on a selective basis, strategically promoting them to some, but not marketing them to others. Just as resale carriers brought competitive prices and services to the small business community in the interexchange market, so too will they bring advanced telecommunications services on a competitive basis to those segments of the local market to which incumbent LECs intentionally or inadvertently do not market these services. Perhaps even more critically, armed with a full array of service offerings, resale carriers will be in a position to continue

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[76] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 11 FCC Rcd. 18455, ¶ 11 (1996), *pet. for recon pending, aff'd sub nom.* Cellnet Comm. v. FCC, Case No. 96-4022 (6th Cir. July 7, 1998).

[77] Id. at ¶ 10.

to generate overall competitive pressures in the local market, providing what, as noted above, has been to date the principal source of competition for incumbent LECs.

Because the bulk of TRA's resale carrier members are small providers,[78] they simply do not have the financial wherewithal to provide an advanced telecommunications service offering absent the availability for resale of advanced telecommunications services at wholesale rates. As the Commission predicted, many new market entrants are "unable . . . to bear the financial risks of entry by means of unbundled elements."[79] Resale is the only viable "entry strategy for small businesses that . . . lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks."[80] It was undoubtedly to provide a financially viable means for small businesses to participate in the local telecommunications market and to bring to that market the competitive benefits they have brought to underserved segments of the interexchange market that Congress not only identified resale as a market entry vehicle, but designated it a coequal entry strategy, no less important than physical network interconnection or unbundled network

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[78] While the telecommunications resale industry is a maturing market segment comprised of an eclectic mix of established, publicly-traded corporations, emerging, high-growth companies and newly-created enterprises, the "rank and file" of TRA's membership is still comprised of small to mid-sized carriers serving small to mid-sized businesses and residential users. The average TRA resale carrier member has been in business for five years, serves 10,000 to 20,000 customers, generates annual revenues of $10 to $20 million and has in the neighborhood of 50 to 100 employees. Half of TRA's resale carrier members are non-facilities-based providers, with many of the remainder being "switch-based" only for a portion of their traffic. Source: TRA's "1997 Reseller Membership Survey & Statistics" (Oct. 1997).

[79] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 334.

[80] Id. at ¶ 907.

access.[81] And as the Commission has recognized, that designation imposes on the Commission the obligation to remove, much less not to create, economic impediments to resale.[82]

Without the availability for resale of advanced telecommunications services at wholesale rates, TRA's resale carrier members would be required to acquire certain facilities and collocate them in multiple central offices in every locale in which they currently provide, or intend in the future to provide, local service. The cost of such a requirement would be prohibitive for the overwhelming majority of TRA's resale carrier members. As described in the USTA Study, the "fixed costs (both capital and administrative) associated with making a central office capable of supporting its first DSL customer . . . include space planning, installing DSL modems and multiplexers at the central office, and installing necessary connections to the data backhaul network and OAM systems," as well as additional "per-customer" costs, including "installation and the cost of the DSL modem."[83] These costs have been conservatively estimated to "run over $1,000 per line and up."[84] Making the point dramatically, US WEST declares "deploying xDSL to a central office requires enormous capital investments,"[85] citing "$73,000 installed" as the cost of but one "basic,

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81 Id. at ¶ 12.

82 Id.

83 Crandall, R. W., and Jackson, C. L., Eliminating Barriers to DSL Service, at p. 18. Of course, the incumbent LECs for which USTA was calculating costs do not incur the additional costs of collocating in multiple central offices, including per-office non-recurring charges in the tens of thousands of dollars and monthly recurring charges in the thousands, of dollars

84 Merrill Lynch Capital Markets, Industry Report at 4.

85 "Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services," filed in CC Docket No. 98-26 on February 25, 1998 at p. 31.

128-user DSLAM."[86] And, of course, these costs will recur in every central office serving customers to which a competitive LEC seeks to market services.

Exacerbating this problem, the cost of deploying xDSL capability in thousands of central offices is prohibitive not merely for TRA's resale carrier members, but for virtually all competitive LECs.[87] In other words, if incumbent LEC's are relieved of their Section 251(c) resale and network unbundling obligations, no alternative providers which might be more inclined to provide for meaningful resale of their xDSL service offerings are likely to emerge on anything approaching a ubiquitous basis. The Commission, accordingly, would have succeeded only in replacing a monopoly local exchange market with an oligopolistic broadband market populated by the incumbent LEC and a CATV service provider. Unless the Commission is prepared to abandon the concept of a dynamic local telecommunications market populated by numerous aggressively competitive providers, it cannot lift Section 251(c) resale and network unbundling requirements as they apply to advanced telecommunications services.

As TRA emphasized in its comments on the *Notice of Inquiry*, incumbent LECs are once again beckoning the Commission through the looking glass. The Telecommunications Act is intended to accelerate deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition*."[88] Section

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[86] Id. at 35.

[87] *See generally* Bingaman, A. K., Kinkoph, D. W., Burke, T.J., Mathew, R., CLEC Access to xDSL Technology: A Necessary Predicate for Widespread, Competitive Deployment of Broadband Telecommunications Service (June 1998) (filed in CC Docket No. 98-91 on June 24, 1998).

[88] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Conference Report") (emphasis added).

706 of the Telecommunications Act directs the Commission "to accelerate deployment of [advanced telecommunications] services . . . *by promoting competition in the telecommunications market*," specifically empowering the Commission to use as a tool "measures that promote competition in the local telecommunications market."[89] Yet the Commission is contemplating, at the behest of the incumbent LECs, measures which will diminish competition in both the local and long distance markets in order to prompt deployment of advanced telecommunications services which is already being driven by market forces. As TRA noted in its comments addressed to the *Notice of Inquiry*, it's time to take a step back and reevaluate.

## III. If the Commission Persists in Relieving Incumbent LECs of Their Resale and Network Unbundling Obligations as They Relate to Advanced Telecommunications Services, the Structural Separation Requirements Proposed in the *NPRM* Should be Considerably Strengthened

Structural safeguards always look viable on paper and always work effectively in theory. In the real world, however, such safeguards seldom, if ever, provide the envisioned protections. When applied to entities as large as the BOCs and other major incumbent LECs, they are generally defeated by not only the enormity, but the complexity, of the operations involved. Given the myriad means of evading regulatory constraints and the small likelihood of detection, structural safeguards will be ineffective absent a good faith effort by incumbent LECs to comply. And given the enormous incentives on the part of incumbent LECs to evade statutory and regulatory

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[89] 47 U.S.C. § 157 (note); Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996) (emphasis added).

requirements, such good faith compliance is little more than a hope and a dream.[90] If good faith compliance were in the cards, every BOC would currently be providing interLATA service within their respective "in-region States," because each would have promptly complied with all elements on the 14-point "competitive checklist." As it is, incumbent LECs continue to actively resist competitive entry and, approaching the third anniversary of the enactment of the Telecommunications Act, still have yet to remove fundamental economic and operational barriers to entry which they were required by law to eliminate nearly three years ago.

Accordingly, if structural separation is to be effective as a safeguard against anticompetitive abuses, incentives to evade statutory and regulatory obligations must be eliminated. Strengthening structural safeguards may increase incrementally the difficulty of evasion or raise incrementally the risk of detection, but the overall impact will be minimal. Neither the Commission nor its regulatory counterparts in the States now have, or will ever have, the resources necessary to render structural safeguards effective without voluntary compliance by the incumbent LECs. Accordingly, if structural separation is to be effective, the benefits of evasion must be reduced to a point at which countervailing benefits or costs outweigh them. In other words, safeguards must be structured to ensure that compliance by incumbent LECs is in their self interest.

TRA submits that the only way to achieve this end is through separation of ownership. Ownership by an incumbent LEC of its advanced telecommunications services affiliate,

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[90] As Judge Greene wrote a number of years ago, "[w]here the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct, albeit necessarily on a limited scale." United States v. Western Electric Co., 767 F. Supp. 308 (D.D.C. 1991).

or common ownership of the incumbent and the affiliate, ensures that the business interests of both entities will be furthered by evasion of not only the structural separation, but the obligation to fully open local markets to competition. In such a circumstance, both the incumbent LEC and the advanced telecommunications services affiliate will benefit from discrimination aimed at unaffiliated competitive providers. Any hope of rendering structural separations effective, therefore, lies in the majority of the stock in the affiliate being held apart from the incumbent LEC and its stockholders. While separate public ownership of a majority of the outstanding stock in the advanced telecommunications services affiliate does not guarantee that the incumbent LEC and the affiliate will not act in concert to thwart competition, it does significantly reduce the incentives to do so and greatly increases the risk of detection.

Separate public ownership of the advanced telecommunications services affiliate, coupled with independent officers, directors and mangers, will activate enforceable Securities and Exchange Commission reporting obligations and create fiduciary duties with respect to the independent stockholders. More importantly, separate public ownership of the majority of the stock will, at least potentially, vest control of the advanced telecommunications services affiliate in hands other than those of the incumbent LEC, a prospect which could be enhanced by precluding the incumbent LEC from controlling a majority of the board of directors of the affiliate. TRA agrees with the Commission that the advanced telecommunications services affiliate must be "truly separate" if structural safeguards are to be effective,[91] but submits that "true separation" requires separation at the ownership, as well as the management, operational and economic, levels.

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[91] NPRM, FCC 98-188 at ¶ 92.

The management, operational and economic separation proposed in the *NPRM* will nonetheless continue to be critical even with respect to an advanced telecommunications services affiliate in which the incumbent LEC holds only a minority interest. Thus, TRA concurs with the *NPRM* that the advanced telecommunications services affiliate must have separate directors, officers and employees, and maintain books, records and accounts separate from those maintained by the incumbent LEC. TRA further agrees that common ownership, as well as joint installation, operation and maintenance, by the incumbent LEC and the advanced telecommunications services affiliate of network facilities, and the land and buildings on and in which such facilities are housed, must be prohibited, although TRA would expand this prohibition to include all corporate assets. Likewise, TRA concurs with the *NPRM* that an advanced telecommunications services affiliate should not be permitted to obtain credit based upon the assets of the incumbent LEC with which it is affiliated. As proposed in the *NPRM*, all transactions between the incumbent LEC and the advanced telecommunications services affiliate must be at arm's length, in compliance with the Commission's affiliate transaction rules, reduced to writing, and made promptly and publicly available through the Internet. TRA concurs with the Commission that all network interconnection provided by the incumbent LEC to the advanced telecommunications services affiliate must be undertaken pursuant to tariff, although TRA would include within this mandatory tariffing obligation all access to unbundled network elements and retail services provided to the advanced telecommunications services affiliate by the incumbent LEC. Finally, TRA agrees with the *NPRM* that the incumbent LEC should be precluded from discriminating in favor of its advanced telecommunications services affiliate in any way.

TRA submits, however, that these separation and nondiscrimination requirements should be expanded in a number of respects to enhance their effectiveness. First, TRA strongly recommends that, to the extent an advanced telecommunications services affiliate is not deemed an incumbent LEC as urged by TRA in an early section of these comments, Section 251(c) obligations should follow any and all transfers by an incumbent LEC to the affiliate of network facilities, including equipment uniquely used to provide advanced telecommunications services such as DSLAMs and packet switches. As the Commission has previously recognized, an affiliated entity to which a BOC "transfers . . ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)" is an assign of the BOC "with respect to those network elements."[92] The logic underlying this assessment requires a like conclusion here. Such a holding would address the "legitimate concern" that incumbent LECs would seek to evade their Section 251(c) obligations through strategic transfers of network facilities to advanced telecommunications services affiliates. TRA does not believe that any limitations to this approach should be recognized; an affiliate to which an incumbent LEC transfers ownership, or allows the beneficial use, of network facilities should be regulated in its entirety as an incumbent LEC under a form of contamination theory.

Second, TRA urges the Commission to establish balloting and/or other customer allocation procedures to the extent an incumbent LEC has been providing advanced telecommunications services to retail customers, but ceases to do so after formation of an advanced telecommunications services affiliate. An advanced telecommunications services affiliate of an

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[92] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905 at ¶ 309.

incumbent LEC would not be starting out on equal footing with competitive LECs if it initiates service with a customer base which has been assigned to it by the incumbent or which essentially reverts to it by virtue of its affiliation with the incumbent. Accordingly, all competitors must have an equal opportunity to secure some portion of those customers to which the incumbent LEC has elected to no longer provide advanced telecommunications services.

Third, TRA recommends that an advanced telecommunications services affiliate be prohibited from using the name or service marks of the incumbent LEC with which it is affiliated. Any pretense of competitive equality between an incumbent LEC affiliate and competitive LECs is lost if the incumbent LEC affiliate markets under the name or service marks of the incumbent. The corporate names, logos and service brands of the BOCs and other large incumbent LECs are extremely powerful competitive tools, having been pervasive presences in the marketplace, and a part of virtually all consumer's lives, for decades. In fact, apart from their monopoly control of network facilities, name recognition and brand identification are the two must valuable competitive assets held by incumbent LECs. Accordingly, unless the advanced telecommunications services affiliate is regulated as the incumbent LEC, it should not be permitted to avail itself of the benefits associated with the incumbent LEC's name and service marks.

Fourth, the incumbent LEC and its advanced telecommunications services affiliated should be precluded from jointly marketing and/or bundling their service offerings. Any claim of competitive equality between an incumbent LEC advanced telecommunications services affiliate and competitive LECs would be laughable if the incumbent LEC and its advanced telecommunications services affiliate were permitted to market their services as a package or in otherwise coordinated fashion. The affiliate would be perceived by the public as a mere extension of the incumbent rather

that as an independent service provider, affording it a marketing advantage unavailable to unaffiliated providers.

Fifth, an advanced telecommunications services affiliate of an incumbent LEC should have no greater access to the customer proprietary network information ("CPNI") associated with the incumbent LEC's subscribers than competitive LEC's. If the fiction of competitive equality is to be maintained, the affiliate should secure no unique advantage from its affiliation with the incumbent LEC. The affiliate, accordingly, should be required to follow the same consent procedures a competitive LEC must follow to secure access to the CPNI of the incumbent LEC's customers.

Sixth, certain constraints should be imposed on the advanced telecommunications services affiliates hiring and compensation options. The advanced telecommunications services affiliate should be prohibited from hiring past or current employees of the incumbent LEC. Given that there is no meaningful way to regulate personnel actions that effectively amount to uncompensated asset transfers, such transactions should be prohibited altogether. As to officers and other management personnel of the advanced telecommunications services affiliate, compensation, including bonuses and stock options, should by rule be predicated on the performance of the affiliate alone, without reference to the performance of the incumbent LEC. A like reverse limitation should be imposed on the incumbent LEC's compensation policies for its officers and management personnel. Entities which are purportedly dealing with one another at arm's length should not be considering one another's performance in compensating their respective management teams.

Seventh, TRA recommends that the incumbent LEC and its advanced telecommunications services affiliate should be precluded from engaging in joint research and

development. If an incumbent LEC declines to provide advanced telecommunications services as a retail offering, using an affiliate to market these services instead in order to avoid its statutory resale and network unbundling obligations, it should not be permitted to engage in research and development with respect to these services to enhance the service offerings of the affiliated entity. The incumbent LEC should either be in or out of the advanced telecommunications market and should not be permitted to benefit from regulatory relief while at the same time investing in its advanced telecommunications services affiliate's operations through research and development efforts.

Finally, TRA submits that any form of sunsetting applicable to the above requirements is unnecessary. Section 10 of the Communication Act provides a mechanism for relief from these requirements when the appropriate showing can be made. An incumbent LEC that seeks to be relieved of structural safeguards may petition the Commission to forbear from enforcing such requirements and upon a showing that structural separation is no longer necessary to protect consumers or competitors and that elimination of these safeguards would be in the public interest, the Commission will afford such relief, rendering a sunset provision unnecessary.

## III. The Commission Should Act to Enhance Collocation Opportunities and xDSL-compatible Loop Availability

TRA strongly endorses the Commission's ongoing effort to identify and implement additional measures to promote competition in the local market. TRA concurs with the *NPRM* that to this end prompt action is necessary to enhance collocation opportunities and to facilitate xDSL-compatible loop availability. As noted in an earlier section of these comments, competitive inroads into the local market to date have been minimal and what inroads there have been have been

achieved primarily through non-facilities-based resale. Use of unbundled network elements has been far more limited. For example, in the State of Louisiana, the U.S. Department of Justice ("DOJ") found that:

> only two competitive carriers in Louisiana have used any unbundled loops in conjunction with other self-provided network facilities, and, collectively, these carriers have placed in service only about 100 unbundled loops. No CLECs are offering service exclusively using unbundled network elements, and there has been minimal use of unbundled switching or transport in Louisiana.[93]

One of the principal impediments to use of unbundled network elements as a entry strategy for entering the local market involves collocation difficulties. As described by DOJ in the context of BellSouth's application for in-region, interLATA authority in the State of Louisiana:

> BellSouth's policy of requiring carriers that wish to combine network elements to collocate connecting equipment (such as distribution frame) imposes unnecessary costs on competing carriers, impairs the ability of competing carriers to provide reliable service, and will substantially delay entry. These additional costs and delays put potential entrants at a clear competitive disadvantage vis-a-vis BellSouth and are the most likely explanation for the virtual absence of such competition in Louisiana."[94]

Reformation of existing collocation requirements is thus clearly warranted.

To this end, TRA strongly endorses the *NPRM's* suggestion that "additional national rules for collocation" should be adopted "in order to remove barriers to entry and speed the deployment of advanced services," as well as the development of local competition.[95] Moreover,

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[93] Evaluation of the United States Department of Justice filed in CC Docket No. 98-121 at p. 8.

[94] Id. at 9 - 10.

[95] NPRM, FCC 98-188 at ¶ 123.

TRA agrees with the *NPRM* that any such national standards "should serve as minimum requirements and that states should continue to have the flexibility to adopt additional requirements that respond to issues specific to that state or region."[96] TRA cautions, however, that enhancing collocation is not a panacea.

As noted in a previous section of these comments, most potential competitors lack the financial wherewithal to collocate extensively either as local competitors or alternative sources of advanced telecommunications services. Moreover, even for those carriers which can make the enormous capital investment required to collocate ubiquitously, the costs associated with such an effort will likely render such carriers noncompetitive. As described by LCI International Telecom Corp. in a White Paper entitled "CLEC Access to xDSL Technology: A Necessary Predicate for Widespread Competitive Deployment of Broadband Telecommunications Services:"

> As a practical matter, any collocation requirement (whether physical, virtual, cageless, or otherwise) raises competitors' costs well beyond the level that the ILEC will incur, on a per-customer basis, to provide the same service. Collocation requirements of any kind thus could have the practical effect of eliminating an entire class of customers -- those for whom duplicate CLEC investment cannot be justified - from enjoying the benefits of competitive and innovative choices in broadband telecommunications services.[97]

With this predicate in mind, TRA endorses the NPRM's tentative conclusion that "incumbent LECs should not be permitted to impede competing carriers from offering advanced services by imposing unnecessary restrictions on the type of equipment that competing carriers may

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[96] Id. at ¶ 124.

[97] Bingaman, A. K., Kinkoph, D. W., Burke, T.J., Mathew, R., CLEC Access to xDSL Technology: A Necessary Predicate for Widespread, Competitive Deployment of Broadband Telecommunications Service, 21 (June 1998) (filed in CC Docket No. 98-91 on June 24, 1998).

collocate."[98] To this end, collocation opportunities should be expanded to include equipment which integrates switching functionality with the functionality "necessary for interconnection or access to unbundled elements."[99] Distinctions among such functionalities as multiplexing, as to which the Commission currently authorizes collocation, and switching, as to which the Commission does not, are becoming increasingly blurred. Collocation opportunities should thus be afforded for remote switching modules, as well as such other equipment necessary to provide advanced telecommunications equipment as xDSL electronics, modems and Internet routers. Indeed, given the general convergence of technology, TRA submits that collocation opportunities for switching equipment should not be limited to packet switching facilities; such opportunities should be provided for circuit switching equipment as well. TRA submits that the Commission has ample flexibility under Section 251(c)(6) to broadly define the types of equipment which are necessary for interconnection or access to unbundled network elements.

TRA also strongly supports the *NPRM's* endorsement of "cageless" collocation, shared collocation cages, and elimination of minimum size requirements for collocation cages.[100] "Cage-based" collocation is unnecessarily costly and burdensome, particularly for smaller providers, and creates artificial space constraints. Cageless collocation can be implemented far more quickly, and at a fraction of the cost of cage-based collocation. Shared collocation cages and elimination of minimum size requirements for collocation cages will also substantially reduce the costs attendant to collocation. As the *NPRM* notes, use by selected incumbent LECs of these collocation

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98 NPRM, FCC 98-188 at ¶ 129.

99 47 U.S.C. § 251(c)(6).

100 NPRM, FCC 98-188 at ¶ 137.

opportunities confirms their viability, both with respect to technical feasibility and network security considerations.[101]

As the *NPRM* correctly notes, other matters which must be addressed to enhance collocation opportunities include restructuring cost allocations, minimizing provisioning delays, and accounting for space exhaustion.[102] TRA submits that the imposition of all space preparation charges on the first collocating competitor constitutes a substantial barrier to entry. TRA believes that the New York approach of allocating to a collocating carrier only its proportionate share of the costs of space preparation and allowing for payment of these costs in installments are important steps. Another important element would be imposition of costing constraints limiting recovery of the expense associated with space preparation to total element long run incremental costs.

Adoption of presumptive reasonable deployment intervals for new and expanded collocation arrangements also would significantly enhance collocation opportunities. Delay interfers with business plans, undercutting the competitive effectiveness of new market entrants and raising the cost of doing business. Cageless collocation arrangements can be implemented within 30 days. Multiple month delays in implementing collocation arrangements cannot and should not be tolerated.

TRA concurs with the *NPRM* that an incumbent LEC that cites space exhaustion as its rationale for not providing physical collocation opportunities should be required to allow carriers seeking to collocate the opportunity to tour the subject facility.[103] The tour should be designed to not only confirm the unavailability of collocation space, but to ensure that the incumbent LEC, as

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101 Id. at ¶ 139.

102 Id. at ¶¶ 142 - 49.

103 Id. at ¶ 146.

well as other collocators, are using the space efficiently. TRA agrees with the *NPRM* that State Commissions are best positioned to resolve disputes regarding space availability and usage efficiency. TRA also agrees that incumbent LECs should prepare and provide to requesting carriers up-to-date listings of currently available and anticipated collocation space, disaggregated by central office and other locations.

Finally, TRA submits that the Commission should explore means of avoiding the need for collocation in order to better address space exhaustion impediments. For example, use of an electronic means, such the recent change capability, of separating and recombining network elements should lessen demands for collocation space. As DOJ has noted, "scarce collocation space for combining BellSouth UNEs will inevitably restrict use by other competitors needing such space to interconnect their network facilities."[104]

The NPRM is also correct that "strengthening] the ability of new entrants to gain access to xDSL-compatible loops" is likewise an essential objective.[105] Here too, TRA supports the adoption of national standards which would serve as minimum requirements to which individual States could add state-specific obligations. TRA also agrees with the *NPRM* that adoption of uniform standards for attachment of electronic equipment at the central office end of the loop would serve to reduce both the costs and time-to-market experienced by competitive LECs.[106]

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[104] Evaluation of the United States Department of Justice filed in CC Docket No. 98-121 at p. 13.

[105] NPRM, FCC 98-188 at ¶ 151.

[106] Id. at ¶ 163.

TRA endorses the *NPRM*'s proposal to require incumbent LECs to provide requesting competitors with sufficiently detailed information regarding loops to permit an independent assessment of their xDSL compatibility.[107] TRA agrees that information such as location, length, electrical parameters, attached electronics, and associated remote concentration devices are essential to determine compatibility with individual DSL technologies. Likewise, TRA concurs with the *NPRM* that the Commission must insist upon nondiscriminatory access for competitive LECs to loop information, including access to the electronic interfaces through which such information can be readily obtained.

With respect to loop spectrum management, TRA suggests that the Commission preserve optimum flexibility as to the use of the loop.[108] TRA submits that to the extent technically feasible, two and potentially more service providers should be permitted to provide service over the same loop using different frequencies to transport voice and data. This flexibility would allow for greater participation by niche service providers, providing increased opportunities for smaller carriers.

As to loop unbundling, TRA agrees with the *NPRM* that to the extent that an incumbent LEC is capable of providing xDSL-based services over a loop, a presumption that it can provide the facility as an unbundled xDSL-compatible loop should attach.[109] TRA further concurs with the *NPRM* that incumbent LECs should be required to provide any technically-feasible method

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107 Id. at ¶ 157.

108 Id. at ¶ 162.

109 Id. at ¶ 167.

of unbundling a digital loop carrier ("DLC") delivered loop requested by a competitor.[110] And TRA agrees that technically-feasible solutions for the provision of xDSL-based services should be made available to competitors by the incumbent LEC on a nondiscriminatory basis.[111] This nondiscriminatory availability should extend to all methods used by the incumbent LEC to provide advanced telecommunications capability, as well as to provisioning intervals. Finally, TRA concurs with the *NPRM* that incumbent LECs should be required to provide sub-loop unbundling and to permit collocation at remote terminals in order to allow competitive carriers to provide xDSL services to end users whose connection to the central office is provided via DLC systems.[112]

## IV. All Advanced Telecommunications Services Should be Made Available At Wholesale Rates for Resale Even to the Extent Such Services Are Used to Provide Exchange Access Services

The *NPRM* tentatively concludes that "advanced services marketed by incumbent LECs generally to residential or business users or to Internet service providers should be deemed subject to the Section 251(c)(4) resale obligation, without regard to their classification as telephone exchange service or exchange access."[113] TRA strongly agrees. The *NPRM's* assessment is consistent with both the text and the intent of the Telecommunications Act.

As the *NPRM* notes, the Commission has now clarified that advanced telecommunications services are "telecommunications services" as defined in the

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110 Id. at ¶ 171

111 Id. at ¶ 172.

112 Id. at ¶ 174.

113 NPRM, 98-188 at ¶ 189.

Telecommunications Act.[114] As explained by the Commission, "xDSL and packet switching are simply transmission technologies . . . [which do] no more than transport information of the user's choosing between or among user-specified points, without change in the form or content of the information sent and received."[115]

The Commission has also confirmed that "advanced services offered by incumbent LECs are either 'telephone exchange service' or 'exchange access'."[116] Explaining its conclusion, the Commission emphasized that these terms were not limited to "the provision of voice, or conventional circuit-switched service" and nothing in the xDSL service architecture fell "outside of the 'telephone exchange service' or 'exchange access' definitions set forth in the [Telecommunications] Act."[117]

The only issues left unresolved by the Commission were which "specific xDSL-based services offered by incumbent LECs are 'telephone exchange service' as opposed to 'exchange access'" and whether advanced telecommunications services which are classified as exchange access should nonetheless be made available at wholesale rates for resale pursuant to Section 251(c)(4).[118] The *NPRM* defers consideration of the former issue to other proceedings in which the question has

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[114] Id. at ¶¶ 35 - 37.

[115] Id. at ¶ 35.

[116] Id. at ¶¶ 40 - 43.

[117] Id. at ¶¶ 41 - 42.

[118] Id. at ¶¶ 40, 188.

already been raised.[119] With respect to the latter issue, the *NPRM* seeks comment to assist it in resolving the matter in this proceeding.[120]

Section 251(c)(4) imposes on incumbent LECs the obligation to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[121] As the *NPRM* correctly points out, advanced telecommunications services "will be offered predominantly to ordinary residential or business users or to Internet service providers."[122] None of these three categories of users are "telecommunications carriers" as defined in Section 3(49) of the Communications Act.[123] A "telecommunications carrier" provides "telecommunications services" -- *i.e.*, transmitting for a fee "between or among points specified by the user of information of the user's choosing, without change in the form or content of the information."[124] The Commission has concluded that Internet access services are "appropriately classed as information, rather than telecommunications, services."[125] As explained by the Commission, "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data

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119 Id. at ¶¶ 40.

120 Id. at ¶ 188.

121 47 U.S.C. § 251(c)(4).

122 NPRM, FCC 98-188 at ¶ 188.

123 47 U.S.C. § 153(48).

124 47 U.S.C. §§ 153948), (51).

125 Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd. 11501, ¶ 73 (1998).

transport."[126] Moreover, the Commission has long classified Internet service providers as end users for purposes of applying access charges.[127]

As the *NPRM* notes, when the Commission ruled that "[e]xchange access services are not subject to the resale requirements of section 251(c)(4)," it predicated that determination on a finding that "[t]he vast majority of purchasers of interstate access services are telecommunications carriers, not end users."[128] Reasoning that "Congress clearly intended section 251(c)(4) to apply to services targeted to end user subscribers," the Commission held that exchange access services which are "predominantly offered to, and taken by, IXCs, not end users" should "not be subject to resale requirements."[129] This logic, of course, does not apply to advanced telecommunications services which are offered predominantly to end user subscribers and information service providers.

TRA, therefore, agrees with the NPRM that "advanced services marketed by incumbent LECs generally to residential or business users or to Internet service providers should be deemed subject to the section 251(c)(4) resale obligation, without regard to their classification as telephone exchange service or exchange access."[130]

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[126] Id.

[127] Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158, ¶¶ 341 - 48 (1997), *recon.* 12 FCC Rcd. 10119 (1997), *second recon.* CC Docket No. 96-262, FCC 97-368 (Oct. 9, 1997), *pet for stay denied* FCC 97-216 (June 18, 1997), *aff'd sub nom.* Southwestern Bell Telephone Company v. FCC, Case No. 97-2620 (and consol. cases) (8th Cir. Aug. 19, 1998).

[128] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 873.

[129] Id. at ¶ 874.

[130] NPRM, FCC 98-188 at ¶ 189.